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Office of the Secretary  
Federal Communications Commission  
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Federal Communications Commission  
Office of the Secretary

RE: CC Docket No. 92-90; In the Matter of The  
Telephone Consumer Protection Act of 1991

Dear Sir or Madam:

Enclosed please find the original and nine copies of the Comments of Mr. Fax in response to the above-named Notice of Proposed Rulemaking. Pursuant to 17 CFR 1.419(b), please distribute these Comments to the Bureau, Information Office, and Commissioners.

Thank you,

*Dean Hansell*

Dean Hansell

Encl.

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ORIGINAL  
FILE

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

In the Matter of

The Telephone Consumer  
Protection Act of 1991

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)  
CC Docket No.  
92-90

Comment Date: May 26, 1992  
Reply Date: June 25, 1992  
Adopted: April 10, 1992;  
Released: April 17, 1992

**COMMENTS OF MR. FAX**

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Federal Communications Commission  
Office of the Secretary

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## **COMMENTS OF MR. FAX**

Mr. Fax, by its counsel, LeBoeuf, Lamb, Leiby & MacRae, respectfully submits these Comments in response to the Federal Communication Commission's ("Commission") Notice of Proposed Rulemaking and Request for Comments thereon, released April 17, 1992, in the above captioned matter.

### **I. Summary**

The Comments of Mr. Fax address those portions of the Telephone Consumer Protection Act and the Regulations proposed thereunder which ban the sending of unsolicited advertisements by facsimile. These Comments will begin by discussing the role of facsimiles as a new and potentially significant technology and the reasons that the Regulations, as presently proposed, are probably constitutionally infirm. The Comments will then discuss the Commission's obligation to draft regulations which interpret the Act so as not to offend the Constitution and, consonant with the Commission's mission, to give maximum encouragement to the development of new technologies.

The Comments will then propose alternatives to the proposed Regulations which are consistent with the Commission's responsibilities to this new technology and to the Constitution, and which will provide sufficient protection to the public against unwanted advertising facsimiles.

### **II. Statement of Interest and Position in this Proceeding**

Mr. Fax is a business employing 41 people which, like many other businesses across the country, communicates with its customers chiefly by way of facsimile transmission. Mr. Fax's business involves the distribution of merchandise useful to

owners of facsimile machines, such as fax paper, for which changes in price and availability are extremely frequent, as is the introduction of new products. Facsimile communication is the most efficient means of reaching users of fax machines who are interested in Mr. Fax's products and desirous of keeping abreast of their opportunities to obtain needed merchandise at a favorable price. Mr. Fax sends one-page facsimiles, at night, and every facsimile sent by Mr. Fax advises the recipient that he or she may call a toll free number to prevent Mr. Fax from sending another facsimile. Such requests are scrupulously honored.

The Commission's proposed amendment of Title 47 of the Code of Federal Regulations, Part 64, Subpart K, Section 64.1100(a)(3), which reads "No person may use a telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine," is of great significance to Mr. Fax and its customers. This is because, depending on the manner in which it is interpreted, it may potentially put Mr. Fax out of business entirely, deprive its customers of their best means to fulfill their needs, and stifle the development of this emerging technology, in which Mr. Fax and its customers have an interest.

These comments are made with an understanding and appreciation of the irritation to some owners of facsimile machines as a result of their receipt of unwanted facsimiles. Through thoughtful drafting of its regulations, the Commission may accommodate these persons without detrimentally affecting the

legitimate commercial activity engaged in by the majority of businesses which communicate with their customers by facsimile.

Specifically, the Commission should promulgate regulations which define the term "unsolicited advertisement" in a reasonable manner, in conformance with the Commission's expressed goal of balancing "individuals' privacy rights, public safety interests, and commercial freedoms of speech and trade . . . in a way that protects the privacy of individuals and permits legitimate telemarketing practices," and which will not eliminate from commerce the efficient communication of facsimile advertising material to those who desire to make use of it, and who have a First Amendment right to receive it. Alternatively, the Commission should apply the "established business relationship" exception, which presently applies to telephone solicitation, to facsimile communications as well.

In making its deliberations, the Commission should keep in mind that the impact of the facsimile machine on society and the way we do business is immense, even though the facsimile is still very much in its formative years. The Commission is regulating a developing technology, and should therefore take care to avoid unnecessarily stifling the development of this new medium. Facsimile transmission is not just a faster way to send mail, it is well on the way to revolutionizing how we communicate with one another. Although fax machines are not yet present in every household, the price is dropping, and the capabilities increasing, sufficiently quickly that they soon will be.

No one would have foreseen, a few short years ago, that restaurants would be taking facsimile delivery orders; that radio

stations would be taking facsimile requests; that Courts would be accepting facsimile filings; and that the Supreme Court would even be issuing facsimile injunctions. The recent marriage of facsimile transmissions to personal computers, with the advent of the fax card, which enables computer users to view and modify facsimile transmissions on their computer screens rather than printing them, increases the possibilities for advances in this technology immeasurably. It also eliminates the "paper costs" commonly associated with facsimile receipt, and cited as the sole justification for regulating facsimile transmission through the Act. Particularly in light of this new development, the potential uses for and advantages to facsimile transmission are substantial.

Because facsimile technology is in its infancy, squelching commercial interest in its development at this critical period would prevent untold innovation and refinement. One can imagine the detrimental effect on the development of television or the telephone if premature government regulation had stifled commercial interest in these then-emerging technologies at their advent. For this reason, rash governmental action, particularly action taken in the absence of a sufficient factual showing that it is appropriate and necessary, would be contrary to the Commission's mission to foster the development of new technology generally. (See 47 U.S.C. § 157(a): "It shall be the policy of the United States to encourage the provision of new technologies and services to the public.") For these reasons, Mr. Fax encourages the Commission to take a cautious approach with this new subject of its regulatory powers, at least initially.

Additionally, the Commission should take very seriously its obligation to interpret and apply the Telephone Consumer Protection Act in a constitutional manner, even if the statute itself is facially unconstitutional. The Commission, as discussed below, is in a position to salvage the probably unconstitutional aspects of the Act through appropriate regulation.

### **III. The Commission Should Recognize the Constitutional Backdrop Against Which it is Acting**

At the outset, the Commission's attention is directed to the doubtful constitutionality of that portion of the Telephone Consumer Protection Act which purports to make the sending of "unsolicited advertisement[s]" by facsimile a criminal offense. 47 U.S.C. § 227(b)(1)(C). We realize that the Commission is not at liberty to ignore Congress' mandate. By judicious definition and application of the term "unsolicited advertisement" and the term "express invitation or permission" in the Act, however, it is within the Commission's power, and to the Commission's advantage, to ameliorate some of the probable unconstitutionality of the statute and corresponding regulations as they are presently proposed. If the Commission is willing to narrow the scope of this definition appropriately at the outset, the Commission might salvage some of this portion of the statute.

It is beyond question that the speech which is prohibited by the Act is constitutionally protected. See Central Hudson Gas & Elec. v. Public Serv. Comm'n., 447 U.S. 557 (1980). The advertising sent by Mr. Fax and others like it is extremely similar to that which was the subject of Virginia State Bd. of



Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976), in which the Court struck down a state statute which made it unlawful for a pharmacist to advertise prescription drug prices. Id. at 749-750. Said the Court, upholding the consumers' right to hear the information, "A consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate." Id. at 763. Mr. Fax's transmissions, like those in Virginia Pharmacy, principally advise recipients of changes in price, availability, quantity, and other similarly useful information.

Not only does the Act ban unsolicited commercial speech, but it also bans hybrid political/commercial and charitable/commercial speech. Charitable and political organizations frequently advertise and hold fundraising events of various kinds, and propose commercial transactions, such as participation in charity auctions or attendance at bake sales. Information and persuasive political material often accompanies and is inextricably intertwined with such proposals and requests. In such cases, all aspects of the speech enjoy full First Amendment protection. See, e.g., Secretary of State of Maryland v. Joseph H. Munson Co., 467 U.S. 947, 959-60 (1984) (holding that charitable solicitations "are so intertwined with speech that they are entitled to the protections of the First Amendment".) Further, it is impermissible to separate the fully protected parts of charitable or political solicitation from the whole, and ban only the commercial portion: "[S]olicitation is characteristically intertwined with informative and perhaps

persuasive speech . . . [and] without solicitation the flow of such information and advocacy would likely cease." Riley v. National Federation of the Blind, 487 U.S. 781, 108 S. Ct. 2667, 2677 (1988). Here, the Act, unless rescued by the Commission through appropriate interpretation, appears to unconstitutionally ban fully protected political and charitable speech. As such, their messages, although political or charitable, constitute "advertisements" under the Act.

Because advertising is constitutionally protected, the Commission must consider its regulatory options in light of the stifling effect they will have on this speech. Mr. Fax expects that other commentators will thoroughly address the constitutional shortcomings of the regulatory scheme. These Comments on this topic are confined, therefore, to addressing those shortcomings that can be cured through an appropriate definition of "unsolicited advertisement," and by application of the "established business relationship" exception to facsimile transmission.

**A. The Regulatory Scheme is Unconstitutionally Vague**

In Connally v. General Construction Company, 269 U.S. 385, 391 (1926), the United States Supreme Court held that "[a] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." "The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue." Id. at 393.

This vagueness doctrine is applied with particular force when the challenged statute inhibits freedoms affirmatively protected by the Constitution, such as freedom of speech. This is so because "an unclear law regulating speech might deter or chill persons from engaging in speech or activity with special protection under the Constitution." John Nowak, et al., Constitutional Law, § 16.9 at 846 (3rd edition 1986).

The vagueness doctrine renders the facsimile provision unconstitutional because, as it stands, it is far from clear what is meant by the words "unsolicited advertisement." Although "unsolicited advertisement" is further defined as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission," (§ 3(a)(4)), the definition is not helpful in the context of this regulatory scheme. Does it mean that permission must be obtained prior to sending each fax, or may a sender who has obtained permission to send one fax send another on a later date? (Although there is an explicit exception for an "established business relationship" which applies to the automatic dialer provision, there is no such exception for the fax provision.)<sup>1</sup>

If a church bulletin is sent by facsimile, which bulletin contains a few classified ads buried on the back page, has the law been broken? Even if prior permission is obtained to send

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<sup>1</sup> The disparity in treatment between auto-dialers and facsimiles is inexplicable: surely a voluntary business relationship with the sender would create the inference that the faxes are welcome. No sender with an ongoing business relationship with a recipient would have any interest in jeopardizing that relationship by sending unnecessary, excessively numerous, or annoying faxes.

the bulletin, would the scope of such permission encompass the advertisements where the recipient is not specifically notified that the bulletin contains advertisements?

If an attorney sends a fax to a client in which he alerts the client to an urgent impending difficulty and offers to solve the problem, has he unlawfully offered unsolicited commercial services?

If a consumer requests telecopied "information" about a product from its manufacturer, has the consumer consented to transmission of literature which is more oriented towards sales than towards information? Has the consumer consented to regular "reminders" that the product is still available, or notifications of change in price? If a consumer consents to receive future advertisements for "other products we think you might be interested in," is the sender required to expend any effort matching the products advertised to the perceived needs of the particular consumer, or has a wider scope of permission been given? Clearly, significant guesswork is required of those who would desire to behave in conformance of the regulation without entirely crippling their operations.

The Commission should keep in mind that, as noted above, some of the organizations who will be confused by the Act's vagueness are political and charitable organizations and other persons whose speech, by any standard, is desirable. The Act appears to prevent the NAACP, for example, from announcing the appearance of Coretta Scott King at a political fundraising event. It bans unsolicited facsimile advertising of upcoming

charity auctions, and it prevents a concert promoter from advising ticketholders of a change in time, date or location.

**B. The Regulatory Scheme is Unconstitutionally Overbroad**

Any regulation affecting constitutionally protected speech must be "narrowly tailored to achieve the desired objective." Board of Trustees of the State University of New York ("SUNY") v. Fox, 492 U.S. 469, 480 (1989). In fact, it is not clear what the "desired objective" is in this situation. There are no findings recited in the Act which bear on facsimile transmissions, unsolicited or otherwise. There is virtually no legislative history bearing on the facsimile provision, other than the solitary note that "fax messages require the called party to pay for the paper used." Senate Rep. No. 178, 102nd Cong., 1st Sess., at 2. Even though there is considerable legislative comment and findings regarding the auto-dial provisions, particularly as compared to the facsimile provision, the facsimile provision is far more restrictive.

Even if it is conceded, arguendo, that Congress has a legitimate interest in protecting owners of fax machines from paper expenses, and assuming for the sake of argument the

existence of such a problem,<sup>2</sup> the regulations as presently proposed do not permit those who would like to receive unsolicited facsimile advertising to do so.

Because market information can be transmitted more quickly by fax than by mail, many people actually purchase their facsimile machines for the specific purpose of enabling receipt of facsimile advertising, so that they will have an advantage over, or be on a par with, others who may be seeking the same hard-to-find items, or so that they may receive immediate alerts from, for example, their stockbrokers. The proposed regulatory scheme prevents these persons from using their facsimile machines for the very purpose for which they purchased them. The regulations are not sufficiently narrowly drawn to survive constitutional scrutiny because they prohibit unsolicited transmissions to persons who would welcome them. In short, Congress' apparent assumption that an unsolicited facsimile is an unwanted facsimile is without basis, and is probably erroneous.

Any argument that, in practical terms, no prosecution will arise as a result of a welcome transmission, and that this overbreadth would therefore have no real effect, is entirely

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<sup>2</sup> In fact, it appears that the cost of receipt of junk faxes is far less than the cost of receipt of junk mail or junk telephone calls. The new plain paper machines and fax cards reduce the paper expense to nothing. Even with the older machines, fax paper costs less than five cents per page, and an unwanted fax transmission is instantly identifiable and easily disposed of. Junk mail, in contrast, must be opened before a recipient can determine that it is unwanted, at a considerably greater labor cost. Junk telephone calls are the most expensive and most disruptive intrusion, both because they must be attended to when they come in rather than at a worker's convenience, and because it can take thirty seconds or even a minute for an office worker to determine that the call is unwanted, and to disengage from the call.

without merit. Whether or not such prosecutions result, the chilling effect created by the fear of criminal prosecution will curtail protected commercial, charitable, and political speech, and will infringe on the public's right to receive such speech. Further, the regulations would make lawbreakers out of those who send welcome but unsolicited facsimiles. Since the Commission should consider the constitutionality of its interpretation of an act of Congress, and should enact regulations which interpret and apply the Act in a manner which will not offend the Constitution (Branch v. FCC, 824 F.2d 37, 47 (1987)), the Commission cannot excuse overbreadth in its regulations when to do so will discourage the exercise of constitutionally protected speech.

**IV. The Commission Should Define "Unsolicited Advertisement" So That Its Meaning More Closely Approximates "Unwanted Advertisement"**

At present, "unsolicited advertisement" is defined as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission." 47 U.S.C. § 227(a)(4) (1991). This definition prevents those who may want to receive unsolicited advertisements, and who have a constitutional right to receive them, from doing so. It also prevents a company like Mr. Fax, which has been sending facsimiles to its interested and uncomplaining customers for a long while, from continuing to communicate with those customers in this manner. Mr. Fax believes that a customer who has been given the opportunity to object, at no cost to himself, to the sending of advertising

facsimiles, and who has not done so, should be deemed to have consented to receiving such facsimiles, at least until such time as the customer objects. Requiring explicit consent prior to sending a fax is in stark contravention of Justice Rehnquist's observation that "First Amendment freedoms would be of little value if speakers had to obtain permission of their audiences" prior to speaking. Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 80, 103 S. Ct. 2875 (1983).

At the very least, the Commission should incorporate a "grandfather" provision in the definition of "unsolicited advertisement" which would effectively provide that customers who have been receiving facsimiles prior to the enactment of the Act, without complaint, be deemed to have given consent. To do so would permit customers who want to receive facsimile communications to continue to receive them, and would permit businesses which now communicate with their customers by facsimile to continue to do so, at least with their already-existing customer base.

Alternatively, the Commission should ease the definition of "unsolicited" to permit facsimile senders to send a single unsolicited facsimile to any particular recipient. As the proposed regulations stand, the definition of "unsolicited advertisement" creates, in place of unsolicited facsimile advertisements, an entirely new kind of junk phone call, in which a fax sender calls a potential recipient to request permission to send a facsimile. Nothing in the statute or Regulations as presently proposed prohibits repeated calling to request such permission; these phone calls to request permission to send



facsimiles arguably create a greater burden on the public than would a single unsolicited facsimile requesting permission to send further advertising.

This problem would be prevented if the Commission were to enact a definitional one-time exception to the "unsolicited advertisement" rule, such that a fax sender may send a single unsolicited facsimile to any recipient that asks whether the recipient wishes to receive additional facsimiles. Further facsimiles may be sent only if the recipient expressly communicates such permission to the fax sender. The Commission could further enact a one-page limit and time-of-day regulations, to minimize the inconvenience and expense that these "prospecting" facsimiles would impose on recipients.

This proposal reasonably balances the rights of senders and willing fax recipients against the rights of unwilling recipients. No unwilling recipient will receive in excess of one page from any fax sender. Further, no affirmative activity is required of recipients in order to avoid further faxes from the same sender. At the same time, those who would like to receive unsolicited advertising will be able to do so, by indicating their desire to do so to senders whom they might not otherwise find out about.

**V. Alternatively, the Commission Should Apply the "Established Business Relationship" Exception to the Facsimile Provision**

Alternatively, the constitutional and practical problems identified above can be somewhat ameliorated, although not eliminated, through application of the "Established Business Relationship" exception, which already applies to telephone

solicitation, to section 64.1100(a)(3). Such action by the Commission would be consistent with its own observation that "if a party already has chosen to do business with a particular caller, a contact by that caller to offer additional products or services is not as intrusive as a call from a business with whom the party has no relationship." NPRM at 5. It would also be consistent with the Statement by President George Bush Upon Signing S. 1462, in which the President noted that the bill "gives the Federal Communications Commission ample authority to preserve legitimate business practices" and that he "fully expect[s] that the Commission will use these authorities to ensure that the requirements of the Act are met at the least possible cost to the economy." 27 Weekly Compilation of Presidential Documents, December 23, 1991.

The explanation for the present inapplicability of the "established business relationship" exception to facsimile advertising is Congress' (probably erroneous) perception that receipt of an unwanted fax is a more expensive proposition for the recipient than is an unwanted telephone call.<sup>3</sup>

Clearly, however, no business will want to jeopardize its established business relationships by sending unwanted facsimiles to its customers. Application of the "established business relationship" exception to section 64.1100(a)(3), therefore, would make little difference to reluctant fax recipients. It

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<sup>3</sup> Congress cited the paper cost as its sole justification for passage of the facsimile portion of the Act, but there is nothing in the record which indicates what this cost is. See Senate Rep. No. 178, 102nd Cong., 1st Sess., at 2. As noted above, the new plain paper faxes and fax cards would virtually eliminate these costs.

would, however, make a substantial difference to those consumers who receive unsolicited advertising by facsimile, and who would like to continue to do so. Businesses which cater to such clientele should not be prevented from communicating with their customers by facsimile, to their detriment and the detriment of the economy in general.

Treating facsimiles on a par with telephone calls is further justified because the expense associated with fax paper is rapidly disappearing. Not only do the newer "plain paper" fax machines lower the cost of receiving a fax considerably, but "fax cards," now available to computer users, permit the recipient to view the message on a computer screen and then choose whether or not to print it. Additionally, fax cards receive faxes faster than do fax machines, as they are not delayed by the printing process, thereby occupying the recipient's telephone line for a much shorter period of time than do fax machines. Fax cards have no moving parts, and therefore wear with age rather than with use, eliminating the argument that receipt of unwanted faxes "wears out" the recipient's equipment. Fax cards cost significantly less than fax machines, and are becoming more and more popular.<sup>4</sup>

As a result of the advent of fax cards and plain paper faxes, the perceived problem, if it exists at all, will be soon be a thing of the past. The Commission should take facts such as

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<sup>4</sup> Obviously, the cost of a computer in which to put the fax card and a printer with which to print the faxes exceeds the cost of the average fax machine. Most fax users, however, already own computers and printers, and incur little marginal cost by installing a fax card. Fax cards now commonly sell at retail for considerably less than \$200.

these into account in promulgating its Regulations, consonant with President Bush's observation that "the Act gives the Commission flexibility to adapt its rules to changing market conditions." 27 Weekly Compilation of Presidential Documents, December 23, 1991.

#### VI. Conclusion

This proceeding presents an important opportunity for the Commission to balance the rights of facsimile senders and willing recipients on one hand with those of unwilling recipients on the other. The Commission further has the opportunity to somewhat ameliorate the potentially unconstitutional effects of the Regulations as they are proposed, which will ease the Commission's task of enforcement considerably. Mr. Fax urges the Commission to carefully consider its proposals, which would enable efficient use of facsimile technology without posing an unreasonable burden on those without an interest in unsolicited advertising materials.

Respectfully submitted,

May 26, 1992

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